

No. 12932.

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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SAMUEL D. COLLINS,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

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## REPLY BRIEF OF APPELLEE.

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## REPLY BRIEF OF APPELLEE.

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### Jurisdictional Statement.

The jurisdiction of this Court is contested.

### Statement of the Case.

The appellant on August 15, 1947, pleaded guilty to an Information on file in accordance with his waiver as to the counts I and II charging violation of Section 145(b) of the Internal Revenue Code, and entered a plea of not guilty to the counts III and IV charging violation of Section 145(c) of the Internal Revenue Code. The appellant was represented by counsel and entered a plea of guilty to counts I and II and was sentenced to eighteen months in a federal penitentiary upon count I and the same on count II, sentences to run consecutively.

The appellant appealed from an Order denying a Motion to vacate the judgment and for leave to withdraw his plea of guilty. The Order denying said Motion was affirmed by this Court on August 22, 1949, in Case No. 11929, *Collins v. U. S.*, 176 F. 2d 773, which record on appeal, all briefs and the decision of the Court are hereby incorporated by reference as though fully set forth herein.

Thereafter, on September 27, 1949, the Mandate of this Court was filed in the District Court.

On November 2, 1950, the appellant filed a Motion to vacate or modify the sentence in the District Court [R. 2, 3 and 4]. This was heard without argument on November 2, 1950, and the District Court denied the Motion [R. 5]. On November 7, 1950, appellant filed a Notice of Appeal [R. 6].

## ARGUMENT.

### I.

#### The District Court Did Not Have Jurisdiction to Entertain the Motion.

Appellant's Motion appears to be a renewal of his Motion previously made to the District Court to vacate his conviction and withdraw his plea of guilty. This Motion was the subject of his prior appeal which affirmed his conviction and is reported in 176 F. 2d 773, certiorari denied 338 U. S. 943. The Mandate was filed in the District Court on September 27, 1949, and the Motion to vacate was not filed until November 2, 1950 [R. 5]. Therefore, the appellant's Motion to vacate or modify the sentence was made more than sixty days after the receipt by the District Court of the Mandate of the Court of Appeals affirming the judgment and the District Court did not have jurisdiction to entertain the Motion.

See

Federal Rules of Criminal Procedure, Rule 35;

*United States ex rel. Quinn v. Hunter*, 7 Cir., 162 F. 2d 644, 647, 648.

### II.

#### The Sentence Was Not Contrary to Law.

The appellant assigns as error that the sentence of the federal court must have a definite starting time. Section 3568, Title 18, United States Code, provides that sentence of imprisonment shall commence to run from the date on which such person is received at the penitentiary for serv-

ice of such sentence, and this Court answered the identical contention in the case of *Hayden v. Warden*, 9 Cir., 124 F. 2d 514, where it stated:

“The court below could properly order the sentence to run consecutively with another sentence and such a sentence is not too uncertain.”

See also,

*Hunter v. Martin*, 334 U. S. 302.

### III.

#### The Waiver of Indictment and Filing of Information in Felony Cases Is Provided by Rule 7(b), Rules of Criminal Procedure.

Appellant contends that the conviction was obtained upon a plea of guilty to an Information without first being indicted by a grand jury. The defendant waived an indictment and consented to the filing of an Information. The Information served the same function as an indictment in apprising the appellant of the crime with which he was charged.

*Fippin, et al. v. United States*, 9 Cir., 162 F. 2d 128, 131.

The constitutionality of Rule 7(b), Rules of Criminal Procedure, which has been promulgated by the Supreme Court, has been approved in subsequently decided cases.

*Fippin, et al. v. United States*, 9 Cir., 162 F. 2d 128, 131;

*United States v. Martin*, 8 F. R. D. 89, affirmed 168 F. 2d 1003, 4 Cir., cert. den. 335 U. S. 872.



All the provisions of the Fifth Amendment may be waived.

*Barkman v. Sanford*, 5 Cir., 162 F. 2d 592, 593,  
cert. den. 332 U. S. 816.

Appellant further contends that proof of his guilt is necessary to support his conviction and sentence after his plea of guilty. The contention is answered in the case of *Berg v. United States*, 9 Cir., 176 F. 2d 122, 125, cert. den. 338 U. S. 876, where it is said:

“by a plea of guilty, \* \* \* all defenses are waived and the prosecution is relieved from the duty of proving any facts. The effect is the same as if the defendant had been tried before a jury and been found guilty upon evidence covering all material facts.”

### Conclusion.

1. The District Court did not have jurisdiction to hear appellee's Motion.

2. There is no merit to any of the errors designated by the appellant.

Respectfully submitted,

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